Orbis Investment Advisory Pty Limited

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By email: fundspassport@treasury.gov.au

Financial Services Unit
Financial System and Services Division
The Treasury
Attention: Trudie Wykes, Judy Poon

Dear Trudie and Judy

ASIA REGION FUND PASSPORT – SUBMISSIONS ON DFAFT MEMORANDUM OF UNDERSTANDING

We set out below our submissions on Annexes 1, 2 and 3 of the draft Asia Region Funds Passport Memorandum of Understanding (**MoU**).

1) Investment manager delegation (Annex 3, section 11)

COMMENT: The MoU permits an Operator to delegate more than 20% of the investment management (**IM**) function to a manager regulated in a passport participant country or in an economy that has a regulatory framework for financial asset schemes that is broadly similar in effectiveness to the relevant Home Economy. The Working Group has indicated that it considers the regulatory frameworks of France, Germany, Ireland, Luxembourg, the United Kingdom and the United States as broadly similar for this purpose.

As previously highlighted, it is common for IM functions to be delegated and sub-delegated to managers based overseas with experience in the relevant jurisdictions (having regard to the assets held by the scheme). Often this may involve sub-delegating to local managers who focus on investment opportunities for the particular region. Not all of the delegates or sub-delegates will therefore fall within categories of 'acceptable' managers set out in section 11 from the outset.

We consider the 20% limit on delegation to be highly prohibitive, especially for Australian managers that are part of an international or global organisation. This is because Australia only represents 2% of the world markets so it is highly possible and probable that such delegation will be over 20%. To require the qualifying delegate to go through a process of convincing the Home Regulator that it is domiciled in a jurisdiction where the regulatory framework is broadly similar in effectiveness with that of the Home Regulator:

1. creates disparity in the assessment process between different Home Regulators; and
2. creates an unnecessary burden for the qualifying delegate.

This could lead to an unfair commercial advantage that prejudices Australian managers.

In addition, the above 20% limitation can easily be circumvented. For example the Australian fund may delegate 100% of the investment management function to an entity in Luxembourg. This meets the criteria above but there is nothing prohibiting the Luxembourg entity from sub-delegating the investment management function to second entity and it does not appear the restriction above applies to the second entity.

RECOMMENDATION:

This 20% rule should be eliminated in its entirety as it creates additional layers of complexity that would lead to unfairness and possibly confusion. It should be sufficient that an Operator may delegate to a qualifying delegate that is regulated by a regulator that has signed the relevant IOSCO MoU. If the Operator wishes to delegate to an entity that has not signed the relevant IOSCO MoU, then this entity

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needs to convince the Home Regulator that it is domiciled in a jurisdiction where the regulatory framework is broadly similar in effectiveness with that of the Home Regulator.

Looking at it another way, if the 20% rule were to be maintained, does the end consumer derive any benefit from the Home Regulator's approval that the qualifying delegate has a regulatory framework that is similar to that of the Home Regulator where such regulator is already a signatory to the IOSCO MOU? Such approval does not prevent any entity from becoming insolvent, does not necessarily mean that the Home Regulator will be in regular contact with the 'approved regulator' and does not result in the Home Regulator being able to closely scrutinise the actions of the qualified regulator.

2) Permitted investments – geographical limitation (Annex 3, section 20)

COMMENT: We disagree with the blanket prohibition on passport funds holding any asset that is not issued in an IOSCO jurisdiction. We think this geographical test is unduly restrictive.

RECOMMENDATION: This prohibition should be deleted.

3) Investment restrictions – portfolio allocation (Annex 3, section 30)

RECOMMENDATION: We consider that the single entity limit should be 10% in all cases, rather than the graduated approach as drafted under section 30 of Annex 3. This simplicity provides greater clarity to Operators and their managers, and in our view is likely to result in fewer unintentional breaches.

Additionally, we do not think the acceptable risk test should be introduced, as it serves to create an unnecessary additional compliance burden. Requiring an Operator to conduct the assessments set out in the Feedback Statement every time an investment over 5% is made, and document the conclusions, is cumbersome. As you know, managers will often build up a position over time and in a series of transactions (sometimes over many months), and should not have to conduct continuous assessments of whether asset holdings have an acceptable level of risk.

4) Limit on investments conferring significant management influence (Annex 3, section 36)

COMMENT: The hard limit of 20% proposed in section 36 is incongruous with local takeover laws and introduces compliance confusion. For example, in Australia rules such as the 'creep' exemption may allow a fund (together with its associates) to hold more than 20% of the voting rights in an entity. However, a passport fund which is registered in Australia cannot obtain the benefit of this exemption as it is subject to the rules in Annex 3.

RECOMMENDATION: Given the public policy reason for introducing section 36 is aligned with the policy reasons underpinning the takeover laws in the various jurisdictions, we recommend that section 36 be deleted in its entirety (so that a passport fund complies with the laws of its Home Economy), which should give other passport participants sufficient protection against inappropriate management influence. Alternatively, section 36 can be amended to include language that specifically aligns the maximum holding with what is permitted under Home Economy laws.

5) Marketing and distribution (Annex 1, 2)

COMMENT: We reiterate our concerns regarding the ease with which funds may be distributed in other passport jurisdictions. For example, the MoU does not provide for standardised disclosure and information requirements, so it is likely that Operators will experience a mismatch between jurisdictions. Among other things, this translates to additional costs (potentially including translation costs), and may result in investor confusion as a result of the different content / level of disclosure.

Additionally, Host Economy laws and regulations will apply in respect of distribution, marketing, licensing and complaints. Compliance with the existing laws of each jurisdiction, rather than a settled set of

AUSTRALIA

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common rules, may be prohibitive to Australian Operators and managers. For example, the Corporations Act and ASIC class orders allow certain foreign managers to market in Australia without an AFSL. Laws in other passport economics may not provide Australian managers with corresponding, reciprocal exemptions.

We are happy to engage with Treasury on any of the above or other aspects.

Who we are

Orbis Investment Advisory Pty Ltd (**Orbis Australia**) is an investment advisory firm incorporated in Australia in 2003. Together with our sister company, Allan Gray Australia Pty Ltd, we employ approximately 50 people in Australia (Sydney, Melbourne and Brisbane).

We are part of the Orbis Group, a global investment management firm with over 300 people across offices in Bermuda, Hong Kong, Lausanne, San Francisco, Sydney, and Vancouver. The Orbis Group offers pooled investment products to investors around the world through investment vehicles registered in Australia, Bermuda and Luxembourg (SICAV).

The Orbis Group's funds under management have grown from USD67 million at the beginning of 1989 to approximately USD29 billion as at 31 March 2015.

Yours sincerely

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